

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6190, 6195

To be argued by
JANIS G. SCHULMEISTERS

United States Court of Appeals FOR THE SECOND CIRCUIT Docket Nos. 77-6190, 77-6195

In The Matter
of the

Complaint of TUG OCEAN PRINCE, INC., and RED STAR TOWING
& TRANSPORTATION CO., as Owner and Charterer of the Tug
"Ocean Prince" for Exoneration from or Limitation of Liability,
Plaintiffs-Third-Party Plaintiffs-
Appellees-Cross-Appellants

—against—

UNITED STATES OF AMERICA,
Third-Party Defendant-Appellee.

—against—

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

—against—

PITTSTON MARINE TRANSPORT CORP.,
Defendant-Appellee,

TUG OCEAN PRINCE, INC., and RED STAR TOWING &
TRANSPORTATION CO.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF UNITED STATES OF AMERICA TO THE ANSWERING BRIEF OF TUG OCEAN PRINCE, INC. AND RED STAR TOWING & TRANSPORTATION COMPANY

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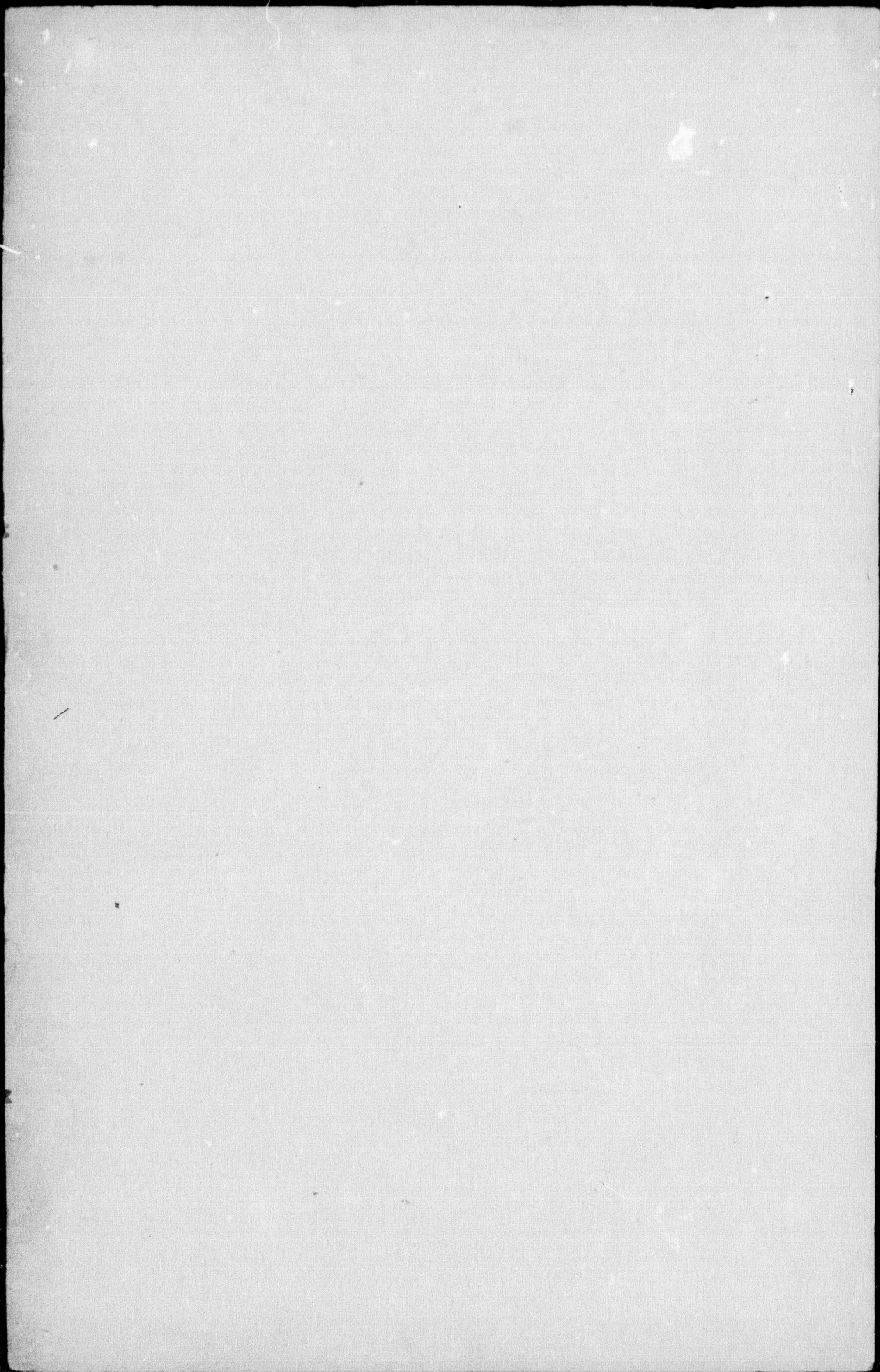


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TUG OCEAN PRINCE, INC., and RED STAR TOWING &
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**REPLY BRIEF OF UNITED STATES OF AMERICA TO
THE ANSWERING BRIEF OF TUG OCEAN PRINCE,
INC. AND RED STAR TOWING & TRANSPORTATION
COMPANY**

Preliminary Statement

As Red Star's answering brief contains assertions not borne out by the entire record as a whole, we are constrained to point out the major inaccuracies.

We shall not repeat the facts nor the issues as they have been set forth in the earlier briefs, to which we respectfully refer the Court.

- I. **The casualty, within Red Star's privity, resulted from inadequate manning and supplying of the tug and the known practice not to have a proper lookout, all of which together amount to "willful negligence" within the meaning of 33 U.S.C. 1321(f) and (g).**

Answering Red Star's Point I, subdivisions A, B, C

The dispatcher Keenan, who assigned the OCEAN PRINCE to the job knew that Reimer had no experience on the Hudson, but little else about Reimer, and he did not bother to find out. Keenan testified:

"Q. Did you have any previous contacts with Mate Reimer, as a dispatcher?

A. Limited. He had been working primarily in the south and I imagine at one point or another I may have spoken to him over the single side band or Pisces operator and taken some information from him, but when a man is working that far away, he is not dispatched as closely as someone who would be working in the harbor. (712a).

THE COURT: What was Mate Reimer's familiarity with the Hudson River?

THE WITNESS: To my knowledge at that time he was generally unfamiliar with the Hudson River." (713a).

* * *

"Q. When you dispatched the boat at 1800, do you know who was on watch?

A. I can't remember.

Q. Did you discuss at that time, did you notify—did you ask to talk to Captain Kiernan at that time?

A. I don't think so.

Q. Did you, in fact, talk to Captain Kiernan at any time from the time you came on watch until the time the Ocean Prince was dispatched to tow the tug New London?

A. I don't think I talked to him.

* * *

Q. Did you have any conversation with the man with whom you talked with respect to the qualifications of the pilothouse crew?

A. You mean with the day dispatcher, Mr. Fitch?

Q. With the man on the boat with whom you spoke.

A. No.

Q. No discussion at all?

A. No." (732a-733a).

By Reimer's own admission, his qualifications for the job on the Hudson were minimal. He testified:

"Q. Had you ever prior to this trip navigated as a mate in charge of watch or as a captain of a tugboat up the Hudson River?

A. No. (157a).

* * *

Q. Have you gone to any navigation school?

A. No.

Q. Have you ever gone to any radar school?

A. No.

Q. This license is for uninspected towing vessels.

A. That's right.

Q. Of not more than 200 tons.

A. Right. That's correct." (154a-155a).

The qualifications of dispatcher Keenan, who picked the OCEAN PRINCE to do the job on the Hudson were similarly lacking:

"Q. What capacity are you employed by Red Star?

A. Dispatcher.

Q. Have you been a dispatcher for five years?

A. That is correct.

Q. Prior to your employment by Red Star, what did you do?

A. I was a deckhand aboard tug boats" (Keenan 704a).

Contrast the above with the testimony of experienced navigators as to who should be navigating on the Hudson. Red Star's own expert Fraccaro testified:

"Q. If you would navigate through an area for the first time, or were advised 'We will go up river X,' and you had never been up that river, what kind of preparations would you make?

A. I couldn't answer that question for you because I have not been sent anywhere that I have not been before, because you have to make so many trips in the area to get pilotage and in order to get that, you have to study the area and make the trips and, therefore, you could not have been there before and you would have to be there for at least 12 round trips." (Fraccaro 516a; T358).

And see the subsequent pages where Fraccaro shows reluctance to go up any river even on a tug pushing a barge for the first time without ascertaining "everything involved" (Fraccaro 516a-518a), and the plans Fraccaro would make before starting the voyage (Fraccaro T360-

T361). And this is an experienced navigator and pilot (Fraccaro T303-T305; also see Glass 595a-596a; Cf. Hallock 696a-701a).

Reimer, however, made no plans (Reimer 196a) because he did not know better because he had no training in navigation or use of radar (Reimer 154a-155a). That is why Reimer says: "I tried all the—all—every precaution that was necessary to take I have taken" (Reimer 193a), but really did nothing with radar, the visible shore line, the visible Con Hook Light and the Bear Mountain Bridge. In contrast, Kiernan testified:

"Q. Captain, you stated in your direct testimony this morning that when you reached a point off of Fort Montgomery area, it would normally start to steer its course towards Sugarloaf Mountain or Sugarloaf Hill. Can you tell by some fixed landmark or object when you were opposite Fort Montgomery?

A. Yes, sir.

Q. How is that, sir?

A. Right there there is a marina. There is lights right in that little section" (397a).

* * *

"Q. Can you pick up Mystery Point on the radar?

A. Yes, sir.

Q. How about Bear Mountain Bridge?

A. Yes, sir, you can pick up the line, yes.

Q. Using that as a mark, would you be able to fix your position generally in feet, miles or yards north of the Bear Mountain Bridge?

MR. LOSQUADRO: Objection. I don't know if he would use the bridge after having passed it. Why don't you put that?

Q. Would you use Bear Mountain Bridge as some sort of mark if your vision was obscured? Would you use that as a means for determining your position after having passed it?

A. Yes, sir.

Q. What would you use forward of you, say Mystery Point?

A. Con Hook.

Q. Anything else?

A. Con Hook.

Q. Can you pick up Con Hook on the radar?

A. Yes" (398a-399a).

* * *

"Q. Is there anything along the inshore, Captain, that would give you a radar return so that you could fix your position in distances from the eastern shore? Is there any hill or object that fixes a return for you?

A. Just Mystery Point.

Q. Once you have passed Mystery Point, you lose that advantage, is that correct, sir?

A. Yes.

Q. But you would know from the radar when you were either abreast or approaching Mystery Point?

A. Yes" (401a).

"Q. Did you see Con Hook Island on radar on that night after the incident?

A. Yes, sir.

* * *

Q. So, radar range to that Con Hook Island could have been taken on that night?

A. Yes, sir.

Q. I believe you testified if there is restricted visibility, you also use the Bear Mountain Bridge to get your bearing or your position in the river, is that correct?

A. Yes, sir.

Q. So the radar on board the Ocean Prince on that evening and the conditions that were there, the radar could have been used to get the vessel's position by referring to, one, the Bear Mountain Bridge and, two, the Con Hook Island?

A. Yes, sir" (410a-411a; also see 413a).

* * *

"Q. Incidentally, Captain Kiernan, when you went back to the wheelhouse did the radar show the outline of the shoreline?

A. Yes, sir.

Q. It also showed Mystery Point area?

A. Yes, sir" (420a).

* * *

"Q. Did the Ocean Prince have any equipment with which to take bearings?

A. No, sir.

Q. I am talking about visual bearings now.

A. Yes, I understand, sir; no, sir.

THE COURT: There was no azimuth over the gyro?

THE WITNESS: No, sir.

Q. The only thing available was the cursor and the radar?

A. Yes, sir.

Q. And that would give you a relative bearing, is that correct?

A. Yes, sir" (424a).

* * *

"Q. Then you would have to apply the difference from your heading on true course?

A. Yes.

Q. So it would take a little bit of figuring?

A. Right" (425a).

Reimer, however, did not know how to properly use the radar, or the shoreline, or the Con Hook Island visible on the radar. He was incompetent on the Hudson River. Compare Fraccaro, who said he would not use the buoy as Reimer did (Fraccaro 514a-515a). Also, see Fraccaro's circle on Ex. DD just north of Mystery Point, labeled with the letter "G" showing where the ice accumulates (Fraccaro T350), not all over Mystery Point as Red Star tries to make it out.

At this point we note Red Star's assertion that "[t]here was no other available aid to navigation" and the totally untrue assertion on page 23 that:

"The (Con Hook) light did not come into view prior to the casualty * * * " (note 5, p. 23 Red Star's brief).

Here Red Star cites its expert Fraccaro at pages 504a-505a, on pages 332 and 333 of the trial transcript. Red Star omits any reference to the following subsequent pages of Fraccaro's testimony in the trial transcript (not reproduced in the appendix):

"THE COURT: From your experience, where would you have to be on the chart in relation to Mystery Point before a tug 20 feet in the air would be able to see Con Hook Light, and put a mark there.

THE WITNESS: You would have to be in the vicinity of Mystery Point, approaching it.

THE COURT: Put an X where you think that would be.

THE WITNESS: (Writing).

THE COURT: He has put an X a little bit above the depth reading of 117 off Mystery Point.

MR. BESHLIAN: Just above the rock identification on the chart?

THE COURT: Yes" (T344).

The mark was made on Ex. 7 and is about 0.62 miles or 1300 yards south of the rock marked by buoy "25" (Fraccaro T351).

From that point it would have taken the flotilla 10 to 12 minutes to reach the rock, all while the Con Hook Light and the shoreline were visible (Fraccaro T351-T352; also see Fraccaro T352-T355 as to how the flotilla can be kept in safe waters.)*

The Con Hook Light is on top of a tower, 46 feet above mean low water (Light List Ex. 2, page 259). It was visible at the rock (Kiernan 374a), is visible off Mystery Point (Fraccaro T344) and at Monitou (Kerns 606a), and really is visible further south. A brief look at the chart shows that there is a straight line of sight from the Con Hook Light all the way down to the center of the Bear Mountain Bridge (see Chart Exs. 7 and DD).

This is where the failure to have a proper lookout is really relevant. Reimer had at least 10 minutes and probably more time during which the Con Hook Light was visible. Yet, he had no lookout and did not notice it (Reimer 196a-197a). Red Star's continuous refer-

* There are 6080 feet in a nautical mile, a vessel proceeding at 7 knots covers 700 feet each minute, and one proceeding at 4 knots 400 feet per minute, the reduced speed testified to by Reimer (Reimer 138a).

ence to not seeing the buoy, we submit, is an attempt to avoid the real issue on this point.

The applicable law as to lookout, the failure to have a qualified person in charge of the tug and lack of equipment to take visual bearings has been treated in prior briefs.

As to Red Star's straining to show that Kiernan was the captain and knew this we point out that 1) the documents were prepared by Kiernan after the casualty and 2) the evidence is to the contrary. The evidence was:

"THE COURT: When did you sign that report and send it in? Obviously it had to be after the 2nd. How long after the 2nd?

THE WITNESS: It could be a day or so.

THE COURT: By the time you signed this, was it apparent to you that they were considering you to be the captain or did you sign it because of some other reason?

THE WITNESS: I signed it because of some other reason.

THE COURT: What reason was that?

THE WITNESS: Because nobody was taking care of the paper work, that's the reason I signed it" (Kiernan 430a).

Kiernan also testified:

"Q. Prior to that date, when did you first join it?

A. I joined the Ocean Prince February 1st, in Port Jefferson.

Q. When you joined the tug at Port Jefferson on February 1st, who was the other pilot houseman at that time?

A. Captain Jesse Cromer" (348a).

* * *

"THE COURT: * * * When Cromer was aboard, what watch did you stand?

THE WITNESS: I stood 0600 to noon and 1800 to 2400.

THE COURT: And that was not the captain's watch, I take it?

THE WITNESS: Yes, sir, it was.

THE COURT: But when Cromer was aboard you stood the captain's watch, starting at midnight—which is it?

THE WITNESS: From 0600 to 1200.

THE COURT: You stood that when Cromer was aboard so that you in effect were acting as captain?

THE WITNESS: No, sir" (352a) [Emphasis supplied].

* * *

"THE COURT: * * * Let me ask the witness. How often before had you come over to work for Red Star as a temporary?

THE WITNESS: That was the only time.

THE COURT: Did you understand that when you came over you were going to be a captain or a mate or did you not understand anything either way?

THE WITNESS: I understood it, your Honor, that I was going over there as mate" (355a) (Emphasis supplied).

* * *

"Q. Do you recall who assigned you to the Red Star tug?

A. It was a night dispatcher from Red Star, I don't know his name.

Q. When he assigned you, did he discuss your experience with respect to tugboats?

A. No, sir.

Q. Did he tell you where your vessel would be operating?

A. No, sir.

Q. Did he tell you that Mr. Reimer would be coming aboard the vessel?

A. No, sir.

Q. When for the first time did you learn that Mr. Reimer would be working with you aboard the Ocean Prince?

A. I didn't know he was going to come on until he was there.

Q. This would have been on the afternoon of February 2nd?

A. Yes, sir.

* * *

Q. Did you say anything or did you see Mr. Reimer when he came aboard in the afternoon?

A. No, sir" (390a-391a).

* * *

"Q. And you continued on watch up until Haverstraw Bay?

A. Yes.

Q. During that period of time, did you have any conversation with Mr. Reimer?

A. No, sir.

Q. Do you know where he was; aboard the vessel?

A. I believe *he was in his room.*

Q. Where was his room located?

A. *His room is in back of the pilothouse*" (392a-393a) [Emphasis supplied].

* * *

"Q. Did you know anything of Mr. Reimer's experience on the river?

A. No, sir.

THE COURT: Were you of the impression that he had navigated the Hudson before?

THE WITNESS: Yes, sir.

Q. What gave you this impression, Mr. Kiernan?

Because the boat runned the river and I assumed, being that he was the captain of it—

Q. Do you know when the boat has run the river?

A. No, sir; no.

Q. Do you know anything of the operations of the Ocean Prince as to where she had been used and where she had been operating?

A. She had been operating around the harbor.

Q. Do you know for how long a period of time?

A. No, sir; no.

Q. Did you know how long Mr. Reimer had been off the boat?

A. No, sir.

Q. Did you inquire when he left the boat?

A. No, sir.

Q. So that your total assumption of his ability to navigate the Hudson is based on the fact that the tug had been used in the area for some time?

A. Yes, sir" (393a-394a).

When this testimony is read together with that of the dispatcher Keenan, *supra*, the only conclusion that can be

reached is that Red Star did not pay particular attention, and made no real effort to ascertain the qualifications of the "navigators" on this voyage.

There only remains Red Star's assertion as to the supposed telling by Kiernan to Reimer of some bad spots to look out for (Red Star's answering brief pp. 15-16). At trial on direct Kiernan testified:

"Q. Did you have any discussion with Mr. Reimer about this particular situation, that Buoy 25?

A. No, sir" (386a; confirmed at 393a that there was not "any discussion" as to what Reimer could expect on the river).

At the first deposition in May 1975 Reimer also said so (Reimer 816a, 833a-834a).

Red Star's attempt on redirect to change Kiernan's testimony was not very successful. See the following colloquy when the taking of evidence was concluded:

"MR. LOSQUADRO: * * * Captain Kiernan testified, after having his transcript read to him here at trial, that he did discuss a couple of bad spots. We have the transcript right here.

THE COURT: I know. I don't believe him" (T969).

And properly so, as the main testimony by both men was different.

In sum, the foregoing shows that Reimer was not qualified, hence incompetent, to navigate an oil carrying flotilla up the Hudson River, that Red Star knew it, but did absolutely nothing to advise or warn the other mariner, Kiernan. Quite reasonably, Kiernan assumed that he was the mate and that Reimer was the captain and knew the Hudson,—all due to the grossly negligent inaction of Red Star's managerial office personnel. Therein lies the cause of the casualty and that is where the

liability for all the damages and clean up costs should remain.

II. Red Star should be liable for the entire pollution clean-up costs and certainly not less than \$186,300.00, the tonnage of the flotilla.

Answering Red Star's Point II

It is quite true that this is a case of first impression in this Circuit as to the meaning of "willful negligence or willful misconduct within the privity and knowledge of the owner (or such third party)" of subsections (f) and (g) of 33 U.S.C. § 1321.* As subsection (b) (3) provides that all regulations issued under that subsection "shall be consistent with maritime safety and with marine navigation laws and regulations and applicable water quality standards," we submit that existing maritime case law must be considered in considering questions "within the privity and knowledge of the owner."

With respect to "willful misconduct" or "willful negligence" we submit that Red Star's quotation on page 35 of its brief from *Grey v. American Airlines*, 227 F.2d 282, 285 (2d Cir. 1955), *cert. den.*, 350 U.S. 989 (1956) does not take into account the fact that "willful negligence" also includes *the intentional performance of an act with reckless disregard of its probable consequences*, see *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532, 536-537 (2d Cir. 1965). Namely, Red Star's utter disregard for the potential pollution hazard considering the tug's crew and how it came to proceed in the Hudson River in ice, at night with a totally in-

* The only other case known to us dealing with this issue and some other issues not present here is *Complaint of Steuart Transp. Co.*, 435 F. Supp. 798 (E.D. Va. 1977), which is presently on appeal to the 4th Circuit Court of Appeals.

experienced man alone at the wheel, where an experienced qualified pilot should have been.

Of course, "willful" is a heavier burden than the easier "without the privity or knowledge" test of 46 U.S.C. § 183(a). While any one of the faults of Red Star alone, even within privity, may not constitute "willful misconduct", on the whole record, we submit, the various inactions and disregard of the potential harm amounts to willful negligence or willful misconduct within the meaning of the statute. If it does not, then it is hard to imagine what is necessary to make a tug company liable for the costs of cleaning an oil spill, save an admission of an actual intent to spill oil,—a situation we can not envision by sane people. We submit that the Congress did not intend the tugboat industry to be exempt from liability for pollution clean-up costs.

The alternative, of course, is to apply the reasoning that the tug and barge, made up as one unit, should be liable for the gross tonnage of that whole unit.

Of course, arguments can be made and cases can be cited for different propositions. We submit that the cases cited in our main brief and the *Burgess v. M/V TAMANO*, 564 F.2d 964, 981-982 (1st Cir. 1977), rehearing denied 1977 A.M.C. 1922 [not otherwise reported] *cert. denied sub nom M/V TAMANO v. United States*, 46 L.W. 3600 (March 28, 1978), permits and militates towards such a result.

Considering the entire record and the fact that this is a case of first impression under a relatively new statute, we ask the Court to hold Red Star liable for pollution clean-up costs up to the tonnage of the flotilla as they did operate and act as one unit and the oil escaped from the barge because of the actions of the "bridge and engine room" of that unit.

CONCLUSION

This Court should affirm the District Court's dismissal of Red Star's claims over against the United States and it should hold Red Star liable to the United States for all the clean-up costs.

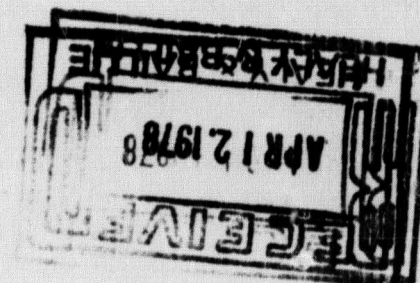
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